SEP 12 1944
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 229

STANLEY TAYLOR, *Petitioner,*

vs.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

PETITIONER'S REPLY BRIEF.

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Subject Index

Page

Preliminary Statement 1

I.

Reply to points raised in opposition 6

Conclusion 30

Table of Authorities Cited

Cases

Adams v. U. S., ex rel. McCann, 317 U. S. 269 ..... 19, 20

Bowles v. Willingham, 64 S. Ct. 641 ..... 14, 15

Flynn v. Bowles, No. 87, and certiorari was denied by this court (64 S. Ct. 617), petition for rehearing denied (64 S. Ct. 785) 15n

Henderson v. Taylor, et al., No. 22,364-W, U. S. Dist. Ct., So. Div., No. Dist. Calif. 10, 11

Olmstead v. U. S., 277 U. S. 438 .....

Wilson v. Brown, 137 F. (2d) 348 14

Yakus v. U. S., 64 S. Ct. 660 ..... 6, 14, 17, 22, 30

Statutes

Emergency Price Control Act of 1942:

Section 2 ..... 22n, 2

Section 4(d) 10, 14, 1

Section 203 ..... 7, 17n, 2

Section 204 ..... 21, 2

Section 205 17

Section 205(b) 21, 2

Section 205(d) .....

Section 205(e) 2

Section 205(f)(2) 25, 26, 2

Miscellaneous

Fifth Amendment to the Constitution 1

23 C. J. S. 1190, pp. 734-735 ..... 25, 2

23 C. J. S. 1191 2

23 C. J. S. 1198 2

23 C. J. S. 1334 2

23 C. J. S. 1337 2

Maximum Rent Regulation 28 6,

Procedural Regulation No. 3:

Section 1300.241 2,

Section 1388.1804 (d) .....

Section 1388.1804(d)(4) 3

Section 1388.1805 (c) .....

Section 1388.1805(d) 3, 25,

Section 1388.1806(a)(6) .....

Section 1388.1806(b)(2) 1

Section 1388.1809 1

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PRELIMINARY STATEMENT.

It is apparent on reading the Brief For The United States In Opposition, that counsel for the government, who are now entering into this case for the first time, have entirely misunderstood some of the basic facts of the case and have misconceived the theory upon which petitioner bases his defense in vital respects.

It is incumbent upon us, therefore, to reply to the brief for the government and cover rather thoroughly the points misunderstood even though that involves in some instances a discussion of the merits of the case which might properly be reserved until this Court acts upon the Petition.

Before proceeding to reply to the contentions of the government, it is appropriate to point out here what the government has omitted in its brief.

We stated in the Petition, under Reasons Relied On for Granting The Writ (p. 13(a)):

> "(a) The capital improvements made by petitioner are admitted, and *that they comply with the Official Interpretation 5(a)1-I defining Major Capital Improvements has not been denied.*"

On page 16 under (c) we again stated:

> "The improvement made fits with exactitude every test of Official Interpretation 5(a)1-I promulgated by the Office of Price Administration for the determination of this question."

and

> "The lower Court held that §1388.1805(d) of the Regulation has no relevancy to this case. (R. 239.) *This is entirely opposed and contrary to Official OPA Interpretation 4(d)-I* entitled 'Procedure Where There Is Doubt As To Whether A Major Capital Improvement Has Occurred,' which provides . . . etc. . . . " (See pp. 17-18 for full text.)

We set forth these Official Interpretations in the Appendix to the Petition in Part I, pp. IV-VI, thereof.

We set forth in said Appendix (on page VI), Section 1300.241 of Procedural Regulation No. 3 which provides:

> "Action taken in reliance upon and in conformity with an official interpretation and prior to any revocation or modification thereof or to any superseding thereof by regulation, order or amendment, shall constitute action in good faith pursuant to the provision

of the act, or of the regulation or order to which such official interpretation relates."

By this provision of the procedural regulation, *supra,* the Official Interpretations here under consideration have been given the force and effect of law in that by fixing his rents in accordance with Section 1388.1804(d)(4) of the Regulation as the first rent after the Major Capital Improvement *as defined by the Interpretation,* petitioner falls within the protection of Section 205(d) of the Act, which provides:

"(d) No person shall be held liable for damages or penalties in any Federal, State, or Territorial Court, on any grounds for or in respect of anything done or omitted to be done in good faith pursuant to any provision of this Act or any regulation, order, price schedule, requirement or agreement thereunder . . . "

Thus, regardless of all other issues in the case, and there are many, these two Official Interpretations establish that the verdict was contrary to the law, and that it was reversible error for the trial Court to refuse to give the Instruction requested concerning Section 1388.1805(d) of the Regulation, which is referred to in Official Interpretation 4(d)-I, *supra.*

Notwithstanding this fact and the strong assertions hereinbefore made and previously asserted in the lower Court (Supp. Tr. 26-32) we find no denial in the Brief for the United States In Opposition. There is no reference to either of these Interpretations in the entire brief, nor is any other Interpretation set forth in opposition;

in fact, the word "interpretation" does not appear any place in the Brief. This refusal of the government and the Office of Price Administration to recognize these Official Interpretations issued by the Administrator has persisted since November 9, 1942, and has resulted in great losses to petitioner and has deprived him of his property to the extent of many thousands of dollars since that time; his liberty has been in jeopardy since December 11, 1942.

It is to be noted in this connection that the making of a major capital improvement cannot result in improper or inflationary rents. The administrator has full authority under the regulation to reduce the rents in such cases *at any time* either on his own initiative or on the application of the tenant. (Section 1388.1804 (d) and 1388.1805 (e).)

In the case of *Olmstead v. U. S.*, 277 U. S. 438, the question arose as to whether the accused was denied due process by reason of the fact that the evidence upon which he was convicted was illegally obtained (wiretapping being a misdemeanor under the state law). There was no question concerning the guilt of the accused. The conviction was upheld by a five to four vote. It is the dissenting opinions in this case in which we are now interested.

Mr. Justice Holmes stated:

> "We have to choose, and for my part I think it a less evil that some criminals should escape than that the government should play an ignoble part. If the existing code does not permit district attorneys to have a hand in such dirty business, it does not permit the judge to allow such iniquities to succeed."

Mr. Justice Brandeis reinforced the position of Mr. Justice Holmes, stating:

> "Our government is the potent, the omnipresent, teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face."

In the instant case we have an entirely different situation as regards the guilt of the accused. Petitioner is unquestionably innocent of the offenses charged. Counsel for the government admits on pages 4 and 5 of the brief in opposition that:

> "The rents which were charged in the transactions alleged in the information are not shown to have exceeded the first rents charged after the alleged changes had taken place." (Br. for U. S., pp. 4-5.)

and yet we find both the Office of Price Administration and the government (if there be any difference) seeking to maintain this unlawful and erroneous conviction.

We respectfully submit that this Honorable Court should take jurisdiction hereof by granting certiorari so that the law may be enforced.

We will now take up the questions raised by counsel for the government.

REPLY TO POINTS RAISED IN OPPOSITION.

I.

In the Argument, point I, pp. 9 to 12 and in footnote 3, p. 11 of the Brief for the government in opposition, counsel erroneously states:

(a) That Maximum Rent Regulation 28 obviously cannot be challenged as invalid upon its face in the sense intended by this Court in the *Yakus* case.

(b) That petitioner has had his full day in Court upon his challenge to the validity of the Regulation . . . that the regulation here in question has been found to be valid in all respects (referring to *Taylor v. Brown*) . . . and that Regulations identicall with the instant regulation (except as to dates) were sustained by the Emergency Court of Appeals in the cases cited in footnote 3, p. 11.

These statements or contentions upon which counsel for the government bases the argument in point I of the government's brief are entirely contrary to the facts.

The Regulation here in question, i. e., Maximum Rent Regulation No. 28 *as it was constituted and effective during the times involved in the criminal Information herein* was not considered by the Emergency Court of Appeals in the cases cited, nor so far as is known to petitioner or his counsel has it ever been the subject of judicial review, notwithstanding that petitioner and Evelyn Flynn each have sought adjudication thereof pursuant to pro-

tests duly filed under the provisions of Section 203 of the Emergency Price Control Act of 1942.[1]

The cases cited by the government (footnote 3, p. 11 of Br. for U. S.) and *Taylor v. Brown,* cited by the government were all instituted pursuant to protests filed between August 27, 1942, and August 29, 1942, inclusive[2] pursuant to the requirement of Section 203 of the Act whereby such protests had to be filed within sixty days after the issuance of the protested regulation. Thus the protests and cases cited applied to the Regulation as it was constituted when it was issued on June 30, 1942, or at the latest as it was constituted on August 29, 1942.

Obviously, the constitutional questions peculiar to the instant case, and arising in substantial part because it is

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[1]Protests filed by petitioner in addition to the original protest, denial of which was the occasion for the filing of the complaint in Taylor v. Brown cited by the government are: Protest (of Stanley W. Taylor) No. 15 Region VIII, denied by the Administrator on August 3, 1943, and now pending before the Emergency Court of Appeals as Taylor v. Bowles No. 81; Protest Docket MR 28-31-P filed August 1, 1944 and still pending before the Administrator. Evelyn Flynn filed a protest seeking adjudication of constitutional questions involving the validity of the Regulation in relation to the same property here involved and relating to the manner in which the Administrator had joined her with the petitioner herein and deprived her of the use and possession of her property thereby. Pursuant to the denial of her protest Evelyn Flynn filed a complaint in the Emergency Court of Appeals where it was docketed as Flynn v. Bowles No. 87, the complaint was dismissed without adjudication and certiorari was denied by this Court. Petition for rehearing was denied by this Court on March 27, 1944. 64 S.Ct. 785.

[2]The Protest in Taylor v. Brown, was filed in San Francisco August 27, 1942; the Protest in Wilson v. Brown, was filed on August 29, 1942; the Protest in Avant v. Bowles was filed on August 28, 1942 and an amended protest was filed on August 29, 1942 (OPA Service, 602:85-86); see record of cases as cited by the government.

a criminal case, were not and could not have been settled by these earlier procedures which were all instituted more than three months before the criminal Information was filed. These constitutional questions are in large part inextricably involved in and related to the validity of the Regulation *as it was constituted during the times involved in the Criminal Information, and as it has been applied to petitioner herein.*

When petitioner filed his protest MR28-19-P on August 27, 1942, pursuant to the denial of which the case of *Taylor v. Brown* was filed, he was not in position to and did not raise the questions peculiar to this case and upon which it is now contended that the Regulation is invalid on its face and invalid as it is applied to petitioner herein. It is a principle of law too well recognized to require further comment here that no person can properly challenge the validity of a statute or rule of law until it has been or is about to be exercised to his disadvantage. On August 27, 1942, and at all times between July 1, 1942, and November 9, 1942, petitioner was operating his property under the rentals established by Section 1388.1804 (d)(4) of the Regulation.[3] No objection was raised by the Administrator to petitioner's operation under 1388.1804

[3](The first rentals following the installation of the laundry equipment on June 27, 1942) Petitioner reported this improvement to the Administrator as a Major Capital Improvement in writing on August 27, 1942 (R. 116-117, see R. 153 bottom—154 and 151, and excerpts from Exhibit 2-B set forth in the Appendix to the Petition herein, Part II, pp. viii-x). As we have heretofore stated, counsel for the government admits in his Statement (Brief for U. S. pp. 4-5) that:

> "The rents which were charged in the transactions alleged in the information are not shown to have exceeded the first rents charged after the alleged changes had taken place."

(d)(4), (the first rent after the major capital improvement) until November 9, 1942, when said Administrator filed an application for a preliminary injunction against petitioner and Evelyn Flynn. (R. 159-160.)[4]

The temporary restraining order which was issued on November 9, 1942, without notice to petitioner, in effect set aside the tenancy agreements under which the apartment house had been operating since before the time the Regulation was issued, prohibited the collection of any compensation for the use of the laundry equipment, or the linens, silver, and additional furniture provided the tenants by Evelyn Flynn (which were not provided on March

---

[4]In an affidavit in support of the application for a preliminary injunction, David C. Dunlap, enforcement attorney for the Administrator stated:

> "On November 2, 1942, Evelyn Flynn advised affiant that the defendants had installed a washing machine in the apartment house for the common use of the tenants. This washing machine, the parties contend, constituted a major capital improvement installed between March 1, and July 1, 1942. *Said machine was undoubtedly an improvement to the apartment house as a whole*, but it did not constitute a major capital improvement as to any unit in the house, and it does not come within the meaning of a major capital improvement under Maximum Rent Regulation No. 28." (Our emphasis.)

The foregoing statement has never been supported by any official ruling of the Office of Price Administration, and in stating that the improvement does not constitute a major capital improvement "as to any unit in the house" or under the Regulation, the above statement is entirely opposed to Official O.P.A. Interpretation 5(a)(1)-I entitled "Elements of Major Capital Improvement" which specifically states:

> "the addition need not necessarily be a part of the structure * * * If the improvement has resulted in some added feature which did not exist prior to the change of a kind which would normally result in an increase in the rental value, *then it would be a substantial change by a major capital improvement.*" (Italics added.)

This Official Interpretation of the Office of Price Administration is set forth in the Appendix to the Petition herein, Part I, pp. iv-v.

1, 1942) and joined Evelyn Flynn as the owner of the furniture, and petitioner (the owner of the real property) in such a way that neither could determine what sums belonged to each, and neither could charge or collect a just compensation or rental for the facilities furnished. (R. 162-163, 46.)

Petitioner promptly appealed to the Administrator to grant him a hearing and determine these matters by administrative process (R. 165) but when he was denied an interview and informed by attorneys for the Administrator that it was a personal matter with them and that he would have many law suits to face (R. 161, 164), petitioner sought to withdraw the property from rental (R. 158, 161-165).

Although petitioner based his right to withdraw the property from rental on Section 4(d) of the Act which provides:

> "Nothing in this Act shall be construed to require any person to sell any commodity or to offer any accommodations for rent."

and although petitioner served notices on the Office of Price Administration and on the tenants specifying this Section as his authority in accordance with the requirements of the Regulation as it was originally issued, the Administrator, on the next day, December 5, 1942, made application to the Court in the civil case, to have petitioner adjudged in contempt of Court and fined $500.00 and confined in prison until he would withdraw the aforesaid notices. (R. 156-174 at 159, 160, 162, 167, 169, 170, 173, see also record of civil case *Henderson v. Taylor, et*

al., No. 22,364-W, U. S. Dist. Ct., So. Div., No. Dist. Calif. admitted in evidence R. 159-160.)

Petitioner was fined $500.00 (the fine was subsequently remitted for compliance with the terms of the injunction) and petitioner was compelled to continue renting the property in question.[5]

The foregoing serves to emphasize one of the radical differences between the Maximum Rent Regulation No. 28, as it was issued on June 30, 1942, and Maximum Rent Regulation No. 28 as it was constituted during the times involved herein. Numerous amendments were made by the Administrator after the statutory period for protest had expired, interpretations were issued which were given the force and effect of law by Section 1300.241 of Procedural Regulation No. 3 (Appendix to Petition, Part I, p. vi). These amendments and Interpretations were issued so frequently that responsible officials and attorneys for the Administrator were unable to keep up with them or advise the public as to their text or the requirements thereunder.[6] The substantive provisions of the regulation (in-

[5]Petitioner is still being compelled to rent the property in question and is still deprived of the right to collect just rents for the facilities furnished or any compensation for laundry equipment and other facilities which were not provided on March 1, 1942. These matters are the subject of appeals and protests now pending in the cases of Taylor et al. v. Bowles, C.C.A 9, No. 10,509; Taylor v. Bowles, U.S.E.C.A. (Emergency Court of Appeals) No. , and Protest MR28-31-P pending before the Administrator.

[6]The following letter dated November 19, 1942 from M. R. Benedict, Area Rent Director in the San Francisco Defense-ental Area, illustrates this point as does the excerpt from letter Ruth Delaney, Real Estate and Insurance Broker dated Decem-21, 1942 and referring to an occurrence in the same office of Office of Price Administration about December 11, 1942. llowing these are excerpts from the Congressional Hearing re-ing to this subject. These letters are respectively Exhibits 184 186 from the "Testimony of Stanley W. Taylor, President, merican Property Owners, Inc., San Francisco, Calif." before

cluding Official Interpretations) had been increased from fifteen or twenty pages when issued, to over 100 pages

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the Special Committee To Investigate Executive Agencies, House of Representatives, Seventy-Eighth Congress, First Session, pursuant to H. Res. 102, A Resolution Establishing a Select Committee to Investigate Acts of Executive Agencies Beyond the Scope of Their Authority. The page references are to the volume entitled HEARINGS (before said committee) Part 1, April 7 (to) June 22, 1943. The letters follow.

EXHIBIT No. 184

OFFICE OF PRICE ADMINISTRATION,
San Francisco, Calif., November 19, 1942.

MISS ANGELA M. WHITE,
1641 Washington Street, San Francisco, California.

DEAR MISS WHITE: This will acknowledge your letter of November 13. For your information I am enclosing a copy of the regulations under which the rent-control program is administered. This is the basic regulation issued about July 1, 1942. There have been since then a good many official interpretations of parts of this and also a few amendments to it. Unfortunately we are not able to supply you with these since we are only now having complete files made up for our own staff. That file is quite voluminous and really only of use to attorneys and examiners. I think, however, this basic regulation will give you most of the information you desire.

Sincerely yours,

M. R. BENEDICT,
Area Rent Director.

(Hearings, Part 1, p. 694 admitted 653 (witness called pp. 646, 652).)

EXHIBIT No. 186

RUTH DELANEY

REAL ESTATE—INSURANCE

SAN FRANCISCO, *December 21, 1942.*

MR. STANLEY TAYLOR,
1201 Fulton Street,
San Francisco, Calif.

* * * * * * *

About the 11th of December I went to one of the attorneys at the O. P. A. to find out how to legally evict a tenant according to the laws set up by the O. P. A. This attorney showed me a list of several reasons for eviction, but added that amendments had been made to this printed list and were in force since the 1st of December but the San Francisco Board had not yet received the changes, but she also stated

eleven months later. (See Rent Regulation For Housing with Official Interpretations, issued June 1, 1943, a 115-

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that they were supposed to enforce the amended list. (For your information, the lady I spoke to was Mrs. Cox.)

* * * * * * *

Your very truly,

/s/ RUTH DELANEY, *Broker.*

(Hearings, Part 1, p. 695, admitted 655.)

Pursuant to the foregoing letters and the evidence adduced in relation thereto, Congressman Fred A. Hartley (New Jersey), made the following comment:

"MR. HARTLEY. In other words in that particular office, the O.P.A. officials didn't know the amendments and changes that had been made in the regulation, but undoubtedly, if that party had violated them, all hell would have broken loose, is that right?

(MR. TAYLOR. That is right.)" (Hearings, p. 655.)

Pursuant to the introduction of additional official letters of the same office of the Office of Price Administration, relating to Interpretations and specific cases, Congressman John Jennings (Tennessee), made the following query which was answered in the affirmative:

"MR. JENNINGS. In other words, they tell him what he must do to get any relief, and then they interpret that statement by saying that they don't mean what they say?" (Hearings, p. 663.)

And Congressman Hartley commented:

"MR. HARTLEY. Well, now, you have cleared up one thing in my mind, because you have proved to me the difference between a regulation and an interpretation is that an interpretation proves that the regulation doesn't mean what it says; so that that is one thing that has been cleared up."

Pursuant to evidence relating to petitioner's case, here before the Court, the following comments were made:

"MR. JENNINGS. It would seem to me that this predicament is somewhat that of the cooperators under the Lever Act of the First World War who were, wholesale, tried under rules and regulations and the Supreme Court held finally that the act and those rules and regulations were so obscure and indefinite as to be meaningless.

THE CHAIRMAN. That may be true, but we can't sit as an appellate court over the District Court of California.

MR. JENNINGS. Of course we can't. But it is predicated on what the O. P. A. is doing, that a citizen can be tried and convicted on an interpretation of a regulation, that seems to be so obscure that the people who issued the regulation had to issue an interpretation to make it have some meaning." (Hearings, p. 673.)

page volume exclusive of Table of Contents.) A most important amendment among those made on October 19, 1942, was one whereby Section 1388.1806(a)(6) of the Pegulation was amended by omitting therefrom the provision originally included therein which provided, in recognition of Section 4(d) of the Act, that a landlord might evict his tenant if he sought in good faith not to offer the housing accommodations for rent. The Emergency Court of Appeals in the case of *Wilson v. Brown,* 137 F. (2d) 348, cited this provision which was in the original Regulation, but which was removed on October 19, 1942, as emphasizing that there was no "taking" of the property in the constitutional sense. The Court there stated:

> "The landlord is thus free to occupy the property himself, or devote it to some commercial enterprise, or utilize it in any other way."

This Honorable Court cited the Emergency Court case of *Wilson v. Brown, supra,* in its opinion in the case of *Bowles v. Willingham,* 64 S. Ct. 641 at 648, stating:

> "There is no requirement that the apartments in question be used for purposes which bring them under the Act."

In the cases of *Yakus v. U. S.,* 64 S. Ct. 660, and *Rottenberg v. U. S.,* decided together on March 27, 1944, this Court further emphasized this construction of the Act at pages 670 and 673. The Court there stated:

> "The present statute is not open to the objection that petitioners are compelled to serve the public as in the case of a public utility, * * *
>
> * * * For as we have seen, Section 4(d) specifically provides that no one shall be compelled to sell any commodity, * * * " (64 S. Ct. 673.)

and again

> "Petitioners were therefore not required by the Act, nor so far as appears by any other rule of law, to continue selling meat at wholesale if they could not do so without loss." (p. 670.)

Thus, we see that the Act itself and the Regulation, as it was originally issued, was sustained upon this principle, i. e., that there is no constitutional taking of property where there is no requirement that it be sold or rented.

Bowles v. Willingham, 64 S. Ct. 641 at 648.

This principle is violated by the Regulation here under consideration, for it plainly requires that the landlords subject thereto must continue to rent such property and does not provide for just compensation therefor. As seen in this case a landlord may be compelled to provide valuable services and equipment which he has never before provided and be deprived of any compensation therefor, for it is plain that many improvements, rehabilitation, or furnishings, may not be removed from the tenant once the tenant has obtained possession thereof or the improvements have been made to the premises.[7]

In this respect then the Regulation is invalid on its face and has been so at all times since October 19, 1942, for

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[7]Evelyn Flynn was denied possession of her furnishings by the Administrator, The Emergency Court refused to entertain the case in *Flynn v. Bowles*, No. 87, and certiorari was denied by this Court (64 S. Ct. 617), petition for rehearing denied. (64 S. Ct. 785.)

it is plainly in contravention of both the Fifth Amendment to the Constitution and Section 4(d) of the Act.[8]

The Criminal Information herein was filed December 11, 1942, after the restraints were placed upon petitioner requiring him to continue renting his property, and before the issues raised by the Restraining Order were settled or determined. The Criminal Information charges criminal collections of rent after October 19, 1942, and covering rental periods after October 19, 1942. (R. 4-40.)

The manner in which it is contended that the regulation is invalid as applied to petitioner in relation to the alleged offenses charged in the Information is set forth in part in the Supplemental Transcript of Record herein on pages 26 to 34. While some of the provisions, which in application against petitioner in the instant case have proven to be invalid (Supp. Tr. 26-34), were in the original Regulation, they were obviously not considered by the

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[8]Other grounds upon which the Regulation was invalid on its face at the times involved herein was the requirement in Section 1388.1806(b)(2) issued October 19, 1942 creating unlawful obstacles to the sale of real property by providing that a purchaser after October 20, 1942 could not obtain possession thereof by the eviction of the tenant *unless he had paid 33⅓ per cent or more of the purchase price excluding any payments made from funds borrowed for the purpose of making such principal payment* and providing further that the purchaser before he takes action to evict must petition the Administrator, obtain a Certificate from the Administrator (if that be possible) *and* THEN *wait three months after the issuance of the certificate before he proceeds under the requirements of the local law to recover possession of the property.*

The foregoing provisions are plainly beyond the scope or authority of the Administrator under the Act.

Section 1388.1809 of the Regulation entitled *Evasion* is invalid on its face if the language therein means what it says. That the Administrator relies upon its unconstitutional meaning is apparent from the manner in which it has been applied in the instant case and in the case of *Bowles v. Taylor et al.* previously referred to.

Emergency Court of Appeals in the manner in which they were used herein, and as we have pointed out hereinbefore, petitioner could not protest them nor was there any necessity or excuse for doing so until by application herein against petitioner they proved to be invalid.[9]

It is not true then under any theory that the Regulation has been found to be valid "in all respects" as claimed by counsel for the government. Nor is it true that petitioner has had his full day in Court upon his challenge to the validity of the Regulation. On the contrary, petitioner has as yet been denied any adjudication of constitutional issues relating to the validity of the Regulation which are determinative of the present case (Supp. Tr. 2-41). Petitioner has not waived or forfeited his constitutional right to such adjudication as it was held by this Court that the petitioners in the *Yakus* and *Rottenberg* cases had done (Supp. Tr. 2-3) and having applied the procedure set up by the Act for the adjudication of these matters in three protests and two complaints to the U. S. Emergency Court of Appeals, petitioner is able to establish that due process is not afforded thereby especially as related to a criminal trial and in the instant case. (Supp. Tr. 4-21, 34-41.)[10]

---

[9]Petitioner has now raised these questions and seeks adjudication of the constitutional questions involving the validity of the Regulation which are peculiar to the instant case, in Protest MR28-31-P which was duly filed under Section 203 of the Act when it became apparent from a denial of rehearing by the Circuit Court that these questions should be presented to the Emergency Court of Appeals.

[10]Congress has recognized this fault in the basic law and has now provided in the Stabilization Extension Act of 1944, that any defendant in a civil or criminal proceeding brought pursuant to Section 205 of the Act may obtain a stay in the proceedings during the pendency of specified protests or complaints in the Emergency Court of Appeals. These provisions are not retroactive however and provide no relief to this petitioner.

From all the foregoing it is clear that there is no meri
in the government's contention on page 12 of its Brie
that petitioner is foreclosed by the decision in *Taylor*
Brown from offering a defense based upon the invalidit
of the Regulation. The Court in *Taylor v. Brown*, in th
first paragraph of its opinion specifically stated:

> "We are thus called upon to consider the constit
> tional validity of the Act and Regulation *general*
> *and without regard to their particular application*
> *the complainant.*" (Our emphasis.)[11]

Thus even though the Regulation had not been so ra
cally amended as to make it clearly invalid, and irresp
tive of all such amendments, petitioner was deprived
adjudication of its validity *as it was applied to petitio*
in the instant case, notwithstanding that he attempted
place these matters before the Emergency Court in *Ta*
v. Brown, supra. (Supp. Tr. pp. 7 (part (d)), 37 (p
(e))-39.)

II.

Under point II (Br. for U. S., pp. 12-13) counsel err
ously asserts that petitioner:

> "was not under any disability or handicap"

by reason of the fact that he, a layman, was without c
sel at the trial. Counsel asserts that petitioner

> "was, rather, the 'shrewd and experienced' la
> whom this Court has recently held to be compete
> waive trial by jury altogether in a prosecutio
> serious crime."

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[11]For discussion of this case and the foregoing quotati
Supplemental Transcript of Record, pages 36-39, 7-8.

citing the case of *Adams v. U. S., ex rel. McCann*, 317 U. S. 269, 278.

There is no support in the record for such an assertion and the entire record indicates the contrary. (R. 220 (13) (15), 204-206.) Counsel cites the statement of the trial judge (R. 181) in support of the proposition that petitioner was treated with especial consideration (because he was without counsel). The record clearly shows to the contrary. The Court in fact took an active part in prosecuting the case *against* petitioner. As for example, the Court persisted in questioning witnesses as to whether there had been any improvements or changes in their apartments *after* they had moved in, in cases where they moved in after July 1, 1942, over the objections of petitioner, and we quote from the record:

> "MR. TAYLOR. It doesn't matter whether there was anything put in after she went in or not. The changes to be effective under the rent regulation must be between March 1st and July 1st.
>
> THE COURT. Overruled. Were there any changes made in the apartment after you moved in?" (R. 56.)

Other instances of such erroneous and highly prejudicial questioning occurred throughout the trial. (R. 49, 55, 58, 61, 62, 63, 65, 67, 68, 75, 78, 79.) The Court took a most active part in the prosecution; made highly prejudicial statements and did not properly protect petitioner from such statements on the part of the district attorney. (R. 177-178, 185, 71-72, 122, 204-205, 220.) Although the Court assumed the responsibility of giving proper Instructions to the jury (Supp. Tr. 44-45) the Instructions given were highly improper and erroneous (R. 181-195) and the Court

refused to give the Instructions proposed by petitioner. (R. 196-198.)

The foregoing matters are ones which should be considered when the case is tried on its merits and the foregoing references are indicated only for the purpose of showing that petitioner was in fact under a severe handicap, contrary to the assertion of counsel for the government.

The facts in *Adams v. U. S. ex rel. McCann, supra,* which was cited by counsel for the government were entirely different, and the conduct of the Court in relation to the matter was in strong contrast to the instant case. In the *Adams* case the defendant answered, when asked by the judge whether he had counsel, that he wished to represent himself, and we quote:

> "In response to the Court's further inquiry whether he was admitted to the bar, McCann 'replied that he was not, but that he had studied law, and was sufficiently familiar therewith adequately to defend himself, and was more familiar with the complicated facts of his case than any attorney could ever be' McCann 'then moved to have the case tried without a jury by the judge alone. There was a brief discussion between the Court, the petitioner, and the Assistant United States Attorney,' after which McCann submitted the following (*writing*) over his signature: 'I, Gene McCann, the defendant herein, appearing personally, do hereby waive a trial by jury in the above-entitled case, *having been advised by the Court of my constitutional rights.*' "

In the instant case, the waiver was initiated by the trial Court and no explanation was made of petitioner's rights.

(R. 95.) Petitioner might well have been induced to answer "yes" in the belief that if he did not do so the Court would simply wait or continue the trial until the missing juror arrived, and that by refusing to assent, he, the petitioner would be prejudiced in the eyes of the jury and the Court. While it is true that the offenses charged were not felonies, the penalty on conviction on all counts charged could have been $105,000.00 fine and twenty-one years in prison. (Section 205(b) of the Act.)

III.

The matters covered under point III, pp. 13-14 of the Brief for United States have in large part been answered under point I hereof.

(a) Counsel asserts (p. 14) that the question of whether the Regulation is unlawfully vague and uncertain is one which may be raised only by following the procedure prescribed by Sections 203 and 204 of the Act, but counsel then proceeds to argue the merits of the contention notwithstanding his assertion that this Court may not consider this matter. The grounds upon which it is asserted that the Regulation is unlawfully vague and uncertain are set forth in the Supplemental Transcript, pp. 26-32 at 28 and 29. Until these questions have been adjudicated by a Court competent to rule on the question of whether *in the instant case* the petitioner has or has not been deprived of due process by reason of the vagueness charged, petitioner has been deprived of adjudication of fundamental questions of law determinative of

the case. It cannot be (and never has been) urged that petitioner has forfeited his right to such adjudication by failure to apply the procedure provided by the Act. On the contrary, as shown in point I hereof, petitioner has made repeated efforts to obtain an adjudication of these matters and is still seeking such adjudication. (See footnotes 5 and 9 under point I hereof.) The fact that the trial Court and the circuit Court were each deprived of the right to consider these questions by Section 204 of the Act is the basis of the first three Questions presented herein. (Petition, pp. 2-3, see also Reasons Relied on for Granting the Writ, pp. 12-13.)

It is obvious that these questions, which were reserved in the *Yakus* case should be decided here. A favorable decision from the Emergency Court of Appeals, which may not come until long after the petitioner shall have served his sentence, cannot protect or conserve petitioner's constitutional right herein.

(b) In the Argument, point III, pp. 14, 15, counsel erroneously asserts that Section 205(b) of the Act prescribes criminal sanctions only for willful violations,[12]

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[12]The first clause of Section 205(b) of the Act prescribes criminal sanctions for willful violation of Section 4 of the Act, but thereafter criminal sanctions are also provided against any person who makes any statement or entry false in any material respect in any document or report required under Section 2 of the Act. For this latter provision there is no defense of innocent intent. As applied to petitioner, if it should be ultimately determined that the improvements (which he made and subsequently registered as "major capital improvements") were not major capital improvements, petitioner could be prosecuted on 48 counts carrying a maximum penalty of 48 years imprisonment and $240,000.00 fine. Thus under Section 205(b) a landlord may be made guilty of a crime by a subsequent ruling that the improvements claimed were not actually major capital improvements under the Regu-

erroneously seeks to imply that the trial Court correctly instructed the jury concerning this element of willfulness.[13] and erroneously states:

> "The verdict of the jury settles the question of the petitioner's knowledge that he was violating the Regulation."

In view of the improper evidence placed before the jury (see point II hereof) and the instructions set forth in footnote 13 wherein the Court instructed the jury that:

> "Wrongful acts, knowingly or intentionally committed, can not be justified on the ground of innocent intent." (R. 188.)

and

> "The law presumes that every person intends the natural and ordinary consequence of his act." (R. 188.)

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lation. Official O.P.A. Interpretation 4(d)-I, which is set forth in the Appendix to the Petition on page vi, makes mention of this risk by the following language:

> "Where the question whether there has been a major capital improvement is a close one, the landlord may not wish to take the risks involved in making his own determination of the question."

These matters as related to petitioner have been raised in Protest MR28-31-P which is now pending before the Administrator.

[13]The instruction in question contains the following language (R. 188):

> "In determining whether or not any criminal intent existed at the time of the commission of the offense charged, I instruct you that it is your duty to weigh all of the evidence and judge each and every circumstance surrounding the offense charged, including the defendant's motive or lack of motive, if any. *You are instructed that the law presumes that every person intends the natural and ordinary consequence of his act. Wrongful acts, knowingly or intentionally committed, can not be justified on the ground of innocent intent.*"

Exception was allowed to the foregoing instruction. (Supp. Tr. 44-45 at 45.)

it is obvious that no such inference can be drawn from the verdict of the jury. In fact, the recommendation of leniency (R. 108) would lend weight to a contrary view.

The foregoing Instructions are plainly erroneous in the instant case.

(See 23 C. J. S. 1198 and cases there cited.)

(c) As to the remaining questions involving the Instructions to the jury, counsel for the government has apparently misconceived the theory upon which petitioner based his defense at the trial. We will here consider only those matters applicable to the points raised by counsel.

(1.) One of the defenses of petitioner was that he did not "demand and receive" from his tenants the amounts stated in the Information "as and for rent", nor any amount "as and for rent" in excess of March 1, 1942, rents. The evidence in support of this defense is overwhelming and there is none to the contrary. Evelyn Flynn testified that she had purchased the furniture in the apartment house in good faith on June 6, 1942, that she controlled the furniture and had complete charge thereof (R. 85-86) and that the total amount received on the furniture over March 1, 1942, was $309.00 per month. (R. 98.) Petitioner's testimony and the Government's Exhibit No. 1 also substantiated this fact as did all the Tenancy agreements, rental receipts, and statements. (R. 46, 176, 47-84.) No tenant testified that the total amounts had been demanded or received by *Petitioner* as or for rent. All recognized Mrs. Flynn's ownership of the furniture. (R. 45-84.)

In view of the forgoing it was error for the trial Court to instruct the jury:

"I instruct you that it is immaterial whether or not you find there was a *bona fide* sale, transfer or change in ownership of the furnishings * * * . and *you should, therefore, disregard evidence relating to said change of ownership.* * * * *the ownership of the furnishings and equipment used in the accommodations, and supplied to the tenants, is immaterial,* * * * ." (R. 190.)[14]

t is improper to give an instruction which in effect with-lraws a theory of the case supported by the evidence.

23 C. J. S. 1190, pp. 734-735.

(2.) In attempting to sustain the trial Court in its re-usal to give the Instructions requested concerning Sec-ion 1388.1805(d) of the Regulation, and Sections 205(e) nd 205(f)(2) of the Act, counsel and the lower Court ave not only ruled contrary to the Official Interpreta-ion relating thereto (Int. 4(d)-I) in the case of the Regu-

[14]The Instruction, here quoted in part, was designed to instruct he jury relating to the change from furnished to unfurnished. 'etitioner has never contended that the sale of furniture to Evelyn Flynn in and of itself changed the apartments from urnished to unfurnished. Petitioner *does* contend however that here *was* a change from furnished to unfurnished. (R. 46, 94, 13, 50, 53-84, 150-151.) Petitioner's contention is based upon the act that the Regulation governs the relationship between the andlord and the tenant and is a restriction upon the landlord. f the landlord supplies the furnishings in an apartment then it s a furnished apartment, but if he disposes of his furnishings nd enters into a new rental agreement with his tenants whereby ney recognize that the landlord no longer owns the furnishings nd they rent the apartment from the landlord as an unfurnished partment, then there most certainly has been a change in the elationship between the landlord and tenant. Obviously the land-ord might have sold the furniture to the tenant or to a third arty who might have moved it out of the apartment. The owner-hip of the furniture is therefore very material, and the Instruc-on was erroneous both as relating to the change from furnished unfurnished and because it, in effect, withdrew from the case he theory of defense here stated under (1).

lation, and contrary to the plain grammatical sense in the case of Section 205(f)(2) of the Act, but they have entirely overlooked or disregarded the theory of defense on which the Instructions were requested.

These instructions and each of them were requested by petitioner in support of his defense that he had no criminal intent, or knowledge that the alleged offenses were in fact crimes, and in support of his contention that the prosecution was in fact a persecution. (R. 159.) Obviously where as in a case like this there is no dispute whatsoever as to the basic facts, the strong presumption is bound to arise in the minds of the jury that if there was no crime involved in the known facts, there would have been no prosecution. The Instructions requested, together with the evidence, would have tended to combat or offset this presumption.

Petitioner established that no findings of fact, no warning notices, no orders, had been issued to him or to Evelyn Flynn by which they could know that in charging the first rents after the installation of the laundry equipment, they were violating the regulation. (R. 95, 180.) Petitioner maintained that there had been no illegal collection of rents (R. 178), that notwithstanding that he still believed the Regulation unconstitutional, he was voluntarily complying therewith and intended to comply. (R. 114, 116, 122, 152, 155, 157-158, 164.) Counsel for the government has referred to a letter written by David C. Dunlap, attorney for the Office of Price Administration, which letter was received by petitioner on August 12, 1942. (R. 107-109.) In this letter the attorney stated, among numerous other matters contained therein, that

e sale of furniture from petitioner to Mrs. Flynn did t constitute a change from fully furnished to unfur-ished. No mention was made in this letter of major pital improvements. Following this letter, petitioner on ugust 14, 1942, wrote a letter in answer thereto, which tter is set forth in the record. (R. 111-115.) In this letter titioner fully explained his position in relation to the ange from furnished to unfurnished, showing that it s based upon the rental agreements with the tenants. . 113.) On August 27, 1942, petitioner voluntarily trans-rted said David C. Dunlap to the Apartment House and petitioner's office and voluntarily showed Mr. Dunlap contracts and records (R. 116, 153-154) and in a writ-stipulation concerning two typical apartments claimed major capital improvement in connection therewith, ich said major capital improvement referred to the ndry equipment which was installed on June 27, 1942. . 154, 117, see excerpt from Exhibit 2-B, Appendix to tition, part II, p. x.)

As indicated by the record, there was no objection sed by the Office of Price Administration to the man-r in which petitioner was operating after the letter of ugust 14, 1942, in which petitioner explained his po-ion. There was never any objection at any time (within previous to the times covered by the Information) to classification of the laundry equipment as a major pital improvement. No tenant except Havercroft had de any protest over the rent and Havercroft had finally d the rent following a conference between Mr. Dunlap d petitioner. (R. 95, 73, 72.)

The instructions requested clearly disclosed by reciting specified sections of the Regulation and the Act, that (a) there was a procedure whereby any disputes or doubts concerning disputed maximum legal rentals could be resolved, and that it was the function of the Administrator to fix the maximum rent by the entry of an order determining such facts (Section 1388.1805(d) of the Regulation), (b) that there was a provision in the law itself Section 205(f)(2), whereby it was the duty of the Administrator to send a warning notice by registered mail to any person whenever in the judgment of the Administrator such person had violated

> "any of the provisions of any regulation * * under Section 2 * * * ."

(Section 2 of the Act authorizes the Rent Regulation here involved), (c) that there was a provision in the law by which any tenant, who had paid as rent a sum greater than that permitted by the regulation, could bring suit for the recovery of $50.00 or treble the overcharge, whichever was the greater.

The fact that petitioner had been permitted to continue renting for five months without notice or order notwithstanding that the method of operation was known to the Administrator, and the further fact that the tenants of 48 apartments had paid the alleged illegal rents for said five months without protest notwithstanding that they had a remedy and relief available to them under the Act raised a strong presumption in favor of petitioner and opposed to the presumption of crime induced by the fact of prosecution. The fact that no notice or warning was given supported petitioner's contention of innocent in

tent and lack of knowledge of any crime. The Instructions requested contained nothing more than a statement of the law.

Where proper request is made for an instruction which correctly propounds the law and is warranted by the evidence and pleadings in the case, it is the duty of the Court to give it, and a refusal thereof will constitute error.

23 C. J. S. 1337.

Where there is doubt as to the propriety of granting instructions, it should be resolved in favor of the accused.

23 C. J. S. 1334.

It is improper to refuse to instruct on a theory which the evidence tends to support.

23 C. J. S. 1190 (p. 735).

(3.) The Instruction concerning the major capital improvement (R. 190) was erroneous. The capital improvement was admitted and the question as to whether it constituted a "major" capital improvement under the regulation was a question of law and should not have been submitted to the jury. If the Court wished to refer to the improvement in its instructions, the term "major capital improvement" should have been defined.

Terms used in instructions should be defined by the Court where they have a technical meaning or may be misapplied by the jury.

23 C. J. S. 1191.

The submission of the matter at all was inconsistent and improper in view of the evidence and ruling of the trial Court. (R. 94, referring to Government's Exhibit No. 1 admitted in evidence, R. 45.)

CONCLUSION.

We have shown that this case does present the que
tions which were reserved in *Yakus v. U. S.*, 321 U. S. 4
which we have set forth on pages 2 and 3 of the Petiti
herein, and that the decision of the Circuit Court
Appeals has so far departed from the accepted and usu
course of judicial proceedings, and has so far sanction
such a departure by the lower Court as to call for an
ercise of this Honorable Court's power of supervision.

We respectfully submit that the writ should be grant

Dated, San Francisco, California,
September 8, 1944.

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